

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs July 16, 2013

STATE OF TENNESSEE v. DAVID ALLAN BOHANON

**Appeal from the Circuit Court for Robertson County
No. 2011CR608, 2011CR540 John H. Gasaway, III, Judge**

No. M2012-02366-CCA-R3-CD Filed October 25, 2013

D. KELLY THOMAS, JR., J., concurring in part and dissenting in part.

I agree with the majority that the standard of review for questions related to probation or any other alternative sentence is one of abuse of discretion with a presumption of reasonableness. See State v. Caudle, 388 S.W.3d 273, 278-79 (Tenn. 2012). Payment of restitution is part of the alternative sentence meted out in this case. See T.C.A. § 40-35-104(c)(2). The majority clearly and completely sets forth the law related to determining the appropriate amount of and payment of restitution. I will therefore restrict my analysis to the conclusion of the opinion, with which I most respectfully disagree.

The Defendant-Appellant contends that the sum of \$16,575 restitution ordered to be paid to Mr. Abernathy is not adequately supported by the evidence and further that payments of \$200 per month exceed his ability to pay. The majority correctly notes that a victim's testimony alone may be sufficient to establish special damages for purposes of restitution. State v. David Robert Blevins, No. E2006-00830-CCA-R3-CD, 2007 WL 1153122, at *8 (Tenn. Crim. App. Apr. 19, 2007). In my opinion, the amount of restitution ordered is supported by Mr. Abernathy's testimony, a professional mechanic for fifteen years. I also believe his testimony provides more than just "general statements regarding the amount of loss without explanation as to how the value was determined[.]" Id. While Mr. Abernathy did initially value the stolen tool box and tools inside to be \$50,000, Mr. Abernathy then testified in sum that the tool box was industrial-sized, made by MATCO, and for which he paid \$2,300. It was functional and worth at least \$1,000 at the time it was stolen according to Mr. Abernathy. Regarding the tools, he said they were likewise top of the line. He named specifically many of the tools in the tool cabinet and generally characterized them as "[e]verything that a mechanic would need . . . to perform any maintenance on any vehicle[, and that means the entire vehicle, front to back, top to bottom, side to side." In summary, he testified that buying comparable used tools from a MATCO or Snap-On dealer would cost

a minimum of \$10,000. Such testimony from a professional mechanic is sufficient to support the court's ordered restitution amount. Again, the trial court's decision regarding restitution is now reviewed under an abuse of discretion and given a presumption of reasonableness. I cannot say that the trial court based its restitution award on a "clearly erroneous assessment of the proof[.]" See State v. Phelps, 329 S.W.3d 436, 443 (Tenn. 2010).

Moreover, the case cited by the majority, State v. Wendell Gary Gibson, No. M2001-01430-CCA-R3-CD, 2002 WL 1358711 (Tenn. Crim. App. Nov. 9, 2010), provides minimal support to the contrary. In Gibson, the victim testified that "her ex-husband's tools were worth \$3,000. Though the victim said she had an itemized list of the tools, she did not specify the type and number of tools stolen or describe them in any way except to indicate there were many of them, they were made by 'Craftsman,' and they were expensive." Id. at *3. Here, Mr. Abernathy, a mechanic by trade, purchased the tools, provided more detail than the victim in Gibson, and made more than conclusory statements regarding the value of the stolen tools, as outlined in his testimony above. In this case, the proof was sufficient to allow the trial court to make a reasonable, reliable determination as to the amount of the victim's loss.

Regarding the Defendant-Appellant's ability to pay, the trial court, after hearing extensive testimony from the Defendant-Appellant, determined that the Defendant-Appellant had the present ability to pay \$200 monthly toward the \$16,575 obligation. The Defendant-Appellant testified that he was living with and was primarily supported by his girlfriend of twenty years, that his monthly expenses were few, and that he mowed yards from time to time. He stated that he suffered from back and knee injuries but could work part-time. The Defendant-Appellant also had a pending application for disability payments. The court's installment order does not evince "reasoning that causes an injustice" to the Defendant-Appellant. See Phelps, 329 S.W.3d at 443.

I agree that the total amount of restitution cannot be paid within the sentence of three years as required by T.C.A. § 40-35-304(g)(2). Therefore, I would remand for entry of a judgment of restitution of monthly payments of \$200 for a total of \$7,200. That amount can be modified upon showing of a change in the Defendant-Appellant's ability to pay. Save this, in all other respects, I would affirm the trial court's restitution award.

D. KELLY THOMAS, JR., JUDGE